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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS; THERE HEARD ON APPEAL FROM THE MUNICIPAL COURT OF CHICAGO

Honorable Frank M. Padden, Trial Judge

STATEMENT OF JURISDICTIONAL FACTS.

This is an appeal from the judgment of the Supreme Court of the State of Illinois—two of the seven judges dissenting—rendered on the 14th day of February, 1936, and becoming final by the denial of a petition for rehearing on April 24, 1936, which affirmed a judgment of The Mu-

nicipal Court of Chicago finding the appellant guilty of violating Section 2947 of the Revised Chicago Code of 1931 by delivering a load of coal trucked direct from a mine located in Morris, Illinois, to a purchaser in Chicago without reweighing the coal and obtaining as required by said section a public weighmaster's certificate showing the gross, tare, and net weight of the load. (*City of Chicago* v. *Waters*, 363 Ill. 125, 1 N. E. (2d) 396.)

The petition for allowance of an appeal to the Supreme Court of the United States is filed herewith on May 25, 1936, and will be presented on or before May 29, 1936, being within three months of the final judgment of the Supreme Court of Illinois.

The court held that this section of the Chicago ordinances (which requires every person delivering coal or other commodities in load lots to obtain a public weighmaster's certificate) applies to the appellant's business of trucking direct to the consumer coal weighed and graded at the mine in accordance with a State statute, and that as so applied said section does not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Section 2947 of the Revised Chicago Code of 1931 is as follows (unprinted record, pp. 107-108):

> "2947. Commodities sold in load lots.] Every load of any commodity, produce or other article or articles of merchandise sold in load lots by weight, delivered by wagon, truck or other vehicle within the city, shall be weighed by a public weighmaster; a certificate of weight for each such load, issued by such public weighmaster, shall be delivered by the driver or person in charge of the wagon, truck, or other vehicle used in the delivery, to the purchaser or consignee of such load, or to his or their agent, at the time of the delivery, and before any of the commodity, produce, or other article or articles of merchandise is removed from the vehicle, or such certificates shall be delivered

to the inspector of weights and measures, or any of his deputies upon his or their demand. When delivery is made, in case no person is present to receive such commodity, produce or other article or articles of merchandise, and if the purchaser or consignee, or his or their agent, cannot be located, then the memorandum or certificate of weight hereinbefore provided for shall be posted conspicuously at the place of delivery, before any of the commodity, produce or other article or articles of merchandise is removed from the vehicle."

Section 3623, below, provides that "in no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein."

Other ordinances of the City of Chicago provide in effect that a dealer owning a scale *in the City of Chicago* may be licensed as a public weighmaster upon giving a $2,000 bond and that the employees of the coal dealer may be licensed as deputy weighmasters.

The sections of the Revised Chicago Code of 1931 so providing are contained in the record here and are as follows:

"2955. Weighmaster can weigh own commodities.] Nothing contained in this article [Regulations as to Weights and Measures] shall be construed to prevent any person, firm or corporation engaged in the business of selling any commodity, produce or article or merchandise which is ordinarily delivered by wagon, truck or other vehicle, from becoming public weighmaster and appointing deputy weighmasters to weigh the commodity, produce or article of merchandise being sold and delivered by such person, firm or corporation; and any weight certificate issued by such person, firm or corporation, or the deputies appointed by

same, covering commodities sold by such person, firm or corporation, shall be of the same effect as the weight certificate issued by any other public weighmaster." (Unprinted record, p. 110.)

"3612. Appointment.] Any person, firm or corporation owning a scale or scales suitable for weighing any commodity, produce or articles of merchandise in load lots, when contained in any wagon, auto truck or other vehicle, or in any quantity less than load lots when not contained in any wagon, truck or other vehicle, shall be eligible for appointment as a public weighmaster in the city of Chicago upon complying with the provisions of this chapter." (Unprinted record, p. 116.)

"3613. Application.] Any person, firm or corporation owning a scale or scales suitable for weighing as aforesaid desiring to be licensed as a public weighmaster, shall file an application in writing therefor which shall conform to the general requirements of this ordinance relating to applications for licenses, and shall set forth the location of the place of business for which such license is requested. * * *." (Unprinted record, p. 116.)

"3614. Bond—fee.] Such applicant shall also execute and present with his application a bond in favor of the city of Chicago in the sum of two thousand dollars, with such sureties as may be approved by the comptroller, conditioned for the faithful performance of such applicant's duties as a public weighmaster and for the payment by such public weighmaster of any fine or fines which may be imposed upon him, them or it for any violation of said applicant's duties as such public weighmaster. Upon compliance with the conditions above stated and upon payment to the city collector of the sum of twenty dollars as an annual license fee, the mayor may issue a license authorizing such applicant to act as a public weighmaster." (Unprinted record, p. 116.)

"3616. Deputy weighmaster.] Each public weighmaster shall have the power to appoint all necessary deputies to tend to such scales, but each such deputy weighmaster shall furnish a bond in the same sum and conditioned in the same manner as that furnished by the public weighmaster. Each such deputy weighmaster or the public weighmaster appointing him, shall pay to the city collector the sum of ten dollars for an annual license fee as such deputy weighmaster. Each public weighmaster appointing any deputy weigh master shall be answerable for any and all acts of such deputy weighmaster in connection with the weighing of any commodity over the scale or scales of such weighmaster; provided, that such responsibility on the part of the public weighmaster shall not relieve the deputy weighmaster of liability for his own acts. Any public weighmaster shall have the right, at any time after the appointment of a deputy by him, to cancel such appointment, and, upon cancelling such appointment, it shall be the duty of such public weighmaster to immediately notify the inspector of weights and measures that the appointment of such deputy has been cancelled, and thereupon such deputy shall cease to have any authority to weigh any commodity on the scales of such weighmaster." (Unprinted record, pp. 116-117.)

"3617. Scale—how provided.] Each public weighmaster licensed under the provisions of this chapter shall provide his own scales, which shall be of a kind or pattern approved by the inspector of weights and measures, and each such public weighmaster shall keep his said scales properly adjusted and repaired at his own expense. It shall be the duty of each public weighmaster to have such scales inspected by the inspector of weights and measures at least once every six months, and oftener if required." (Unprinted record, p. 117.)

"3623. Weight certificates.] Each public weighmaster shall issue a weight certificate, signed by him

or his deputy, under his official seal, which certificate shall state thereon the following: The commodity, produce, article or articles weighed; the date; the name of the weighmaster or deputy weighmaster who did the weighing; the name and address of the person, firm or corporation for whom the weighing was done; the name of the driver of the vehicle bringing such commodity, produce, article or articles to the scales, or, if the same is not contained in a vehicle, the name and address of the person bringing the same to the scales; where contained in a vehicle, the kind of vehicle and the name and address of the purchaser or consignee of the commodity weighed; when the commodity is loaded in a vehicle, the total or gross weight of the commodity weighed and the conveyance in which it is loaded, together with the driver and any other person who may be on the vehicle when weighed, and of the horses, if a horse-drawn vehicle and the horses are weighed; the tare weight or the weight of the vehicle, including driver and any other person who may have been on the vehicle when weighed while loading and including the horses if they were weighed when the loaded vehicle was weighed; the net weight of the commodity, produce, article or articles contained in such vehicle, or the net weight of the commodity, produce, article or articles when not contained in a vehicle at the time of weighing. In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein; provided, however, that in the case of a divided load, by which is meant a load containing more than one order for the same or different purchasers or consignees, no penalty shall be imposed under this chapter by reason of the fact that the tare weight shown on the weight certificates is only the original tare weight of the vehicle and equipment before loading if in such case each order has been weighed separately and the net weight of each separate order or delivery is cor-

rectly shown on the weight certificate and such correct net weight is delivered." (Unprinted record, pp. 118-119.)

* * * * * * *

The unavoidable effect of the sections quoted is to require that coal shipped into the City of Chicago by truck direct from the mine to the Chicago consumer, although weighed at the mine on State-tested scales pursuant to State law, be unloaded inside the city limits so that the truck can first be weighed empty by a public weighmaster in order to obtain a tare weight for the purpose of making the certificate described in Section 3623, and required by Section 2947, under which latter section the defendant was convicted; and also that non-residents such as the appellant and the mine from which the coal is shipped cannot be licensed as public weighmasters and use scales at the point of original loading outside of the City of Chicago.

The proof shows that the cost of this rehandling of coal is approximately $1.00 a ton and that the coal being soft, its grade is broken down by such rehandling (unprinted record, p. 74). If the grade of the coal is broken down after loading at the mine, then it cannot be legally delivered in the City of Chicago because of Section 3342 of the Revised Chicago Code of 1931, which provides:

> "3342. Delivery ticket—requirements—verifying weight.] Any person, firm or corporation engaged in the business of selling, or selling and delivering, of solid fuel in the city shall provide the driver of the wagon, truck, or other conveyance with a separate delivery ticket for each kind, grade and size of solid fuel contained on the wagon, truck, or other conveyance bearing the name of the person, firm or corporation selling such solid fuel, showing the gross weight, the tare and the net weight of each kind, grade or size of solid fuel, and the name and address of the purchaser of said

solid fuel, or the person, firm or corporation to whom same is to be delivered, which said delivery ticket or tickets shall be delivered by the driver in charge of the wagon, truck, or other conveyance to each purchaser, or his agent or representative, or to the person to whom delivery is to be made, at the time of the delivery of the fuel and before such fuel or any part thereof is removed from such wagon, truck, or other conveyance. In the event that solid fuel is sold or offered for sale by a peddler, or by a dealer making sale or delivery in any other manner than by wagon, truck, or other conveyance, such peddler or dealer, shall deliver to the purchaser or intending purchaser, or his agent or representative, or the person to whom delivery is to be made, before the delivery of such fuel or any part thereof, or to the inspector of weights and measures of the city of Chicago upon his demand, a delivery ticket or tickets bearing the name of such peddler or dealer, his license number if a peddler or name and address if a dealer, and showing the net weight, and the kind, grade and size of the fuel sold or offered for sale. * * *." (Unprinted record, p. 112.)

It clearly appears, therefore, that it is impossible to engage in the business of selling coal to be delivered direct from mine to consumer without violating one or more of these provisions of the Chicago ordinances and, therefore, the effect of holding Section 2947 to be constitutional is to prohibit a perfectly legitimate and lawful business with no benefit to the public that cannot be obtained merely by checking the mine weights in some reasonable manner.

The mine from which the coal was sold is located at Morris, Illinois, and under the State statute on weights and measures (Illinois State Bar Stats., chapter 147) the scale there is inspected by the State Director of Trade and Commerce. The mine scale here involved had been so inspected (unprinted record, p. 73).

A State statute, independently of the city ordinance involved here, requires a delivery ticket in duplicate, as follows (Illinois State Bar Stats. (1935) c. 147, par. 20):

> "§20. It shall be unlawful to sell or offer to sell any coal, coke, or charcoal in any other manner than by weight. It shall be unlawful for any person to deliver any coal, coke, or charcoal unless each such delivery is accompanied by a delivery ticket and a duplicate thereof, on each of which shall be, in ink or other indelible substance, distinctly expressed in pounds, the gross weight of the load, the tare of the delivery vehicle, and the quantity or quantities of coal, coke, or charcoal contained in the vehicle used in such deliveries, with the name of the purchaser thereof, and the name of the dealer from whom purchased. One of these tickets shall be surrendered to the Director of Trade and Commerce, or any city inspector of weights and measures, upon his demand, for his inspection, and this ticket, or a weight slip issued by him when he desires to retain the original, shall be delivered to the said purchaser of said coal, coke, or charcoal, or his agent or representative at the time of the delivery of the fuel; and the other ticket shall be retained by the seller of the fuel. When the buyer carries away the purchase, a delivery ticket showing the actual number of pounds delivered to him must be given to him at the time the sale is made."

In The Municipal Court of Chicago the appellant contended that Section 2947 of the city ordinances was in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (unprinted record, pp. 81-82), but the contention was overruled and The Municipal Court entered judgment against the appellant, finding him guilty and imposing a fine of $75.00 and costs (unprinted record, pp. 16-17).

The appellant appealed to the Supreme Court of Illinois and pursuant to Rule 39 of that court (361 Ill. xix) appel-

lant in his brief assigned among the "Errors Relied On" the following:

> "5. Section 2947 of the Revised Chicago Code of 1931 is invalid and unreasonable as applied to coal shipped in truck load lots from the mine outside Chicago to the consumer within the City of Chicago.
>
> "6. Section 2947 of the Revised Chicago Code of 1931 is unconstitutional as applied to coal shipped in truck load lots from the mine outside Chicago to the consumer within the City of Chicago because it is (a) unreasonable, (b) deprives the defendant of liberty and property without due process of law, and (c) deprives the defendant of the equal protection of the laws and of liberty and property without due process of law in violation of the first section of the Fourteenth Amendment to the Constitution of the United States."

By his brief and reply brief said appellant duly argued that said section of the ordinance involved was in violation of the Constitution of the United States in the particulars stated in such assignment of errors and some of the contentions of the defendant are succinctly stated in a dissenting opinion filed by Mr. Chief Justice Stone and Mr. Justice Shaw of the Supreme Court of Illinois (*City of Chicago* v. *Waters*, 363 Ill. 125, at p. 134, 1 N. E. (2d) 396, at p. 400), as shown by the following excerpt from such dissenting opinion:

> "In our opinion the ordinance set forth in the foregoing opinion is unreasonable and should be held void. It shows on its face that it is cleverly designed for the purpose of conferring a monopoly in the coal business upon dealers residing within the city of Chicago, to the exclusion of other citizens residing outside of that city who have an entirely lawful right to sell to persons who live within the corporate limits. This is apparent from the requirement that the empty wagon or truck must be weighed before the load is delivered

to the purchaser. We cannot perceive any reason why the purchaser could not as well be protected by weighing the empty wagon or truck after delivery. This would permit hauling the load across public scales to obtain the gross weight, the unloading of the commodity, followed by weighing the empty wagon or truck to obtain the tare weight, and the subtraction of the tare from the gross to obtain the net. This procedure would give an accurate net weight, which is the only point as to which the public may require protection, and if that is the true purpose of the ordinance, which it obviously is not, it would serve all legitimate purposes. Under such an ordinance, producers of coal or other commodities who live outside of Chicago could deliver their produce within that city and the residents of that city could have the benefit of whatever savings might be involved. It is clearly unreasonable to require that a load of coal coming into Chicago be unloaded, the truck weighed, then the coal reloaded and weighed again. This extra and useless handling charge can inure only to the benefit of local dealers and it can only result in penalizing the consumer and the outside producer.

"The holding in this case is in our opinion contrary to what we said in *City of Chicago* v. *Kautz*, 313 Ill. 196: 'If, under the guise of protecting the public interests, the ordinance arbitrarily interferes with private business and imposes unusual and unnecessarily restrictive regulations upon lawful occupations it is void. *City of Chicago* v. *Hebard Express Co.*, 301 Ill. 570; *McCray* v. *City of Chicago*, 292 id. 60; *Haskell* v. *Howard*, 269 id. 550; *Frost* v. *City of Chicago*, 178 id. 250; *Toledo, Wabash and Western Railway Co.* v. *City of Jacksonville*, 67 id. 37.' In the same case we pointed out that in order to come within the police power an ordinance of a regulatory nature must be of such a character as to tend in some degree toward the prevention of an offense or the preservation of public health, morals, safety or welfare.

"The argument that the case of *Wisconsin Lime and Cement Co.* v. *City of Chicago*, 312 Ill. 520, is con-

trolling here, is not impressive. This ordinance was there held to be reasonable as applied to coal dealers operating within the city of Chicago, on the ground that it was 'liberal in permitting the dealers themselves to be appointed deputies for their own convenience.' Here the record shows that the complaining mining companies cannot obtain weighmasters certificates, thus effectually shutting out of the markets of the city of Chicago a commodity that the people have a right to buy. To put the unreasonable and unnecessary burden of unloading, weighing the truck and reloading the coal, upon those who would offer coal to residents of the City of Chicago, from the outside of that city, is not in the interest of the public welfare and is not necessary to secure honest weights.

"It is quite as much in the interest of the public welfare that the people of the city of Chicago be afforded access to cheap markets for the necessities of life as it is that weights be watched. To so restrict access to such market by putting such unnecessary expense on the purchaser is clearly unreasonable."

The majority opinion of the Supreme Court, written by Mr. Justice Herrick, is reported under the title *City of Chicago* v. *Waters*, 363 Ill. 125, 1 N. E. (2d) 396, and contains the following, among other language:

"It is here urged that by reason of these requirements, as applied to the defendants, the ordinance is unreasonable, deprives the defendants of the equal protection of the law and deprives them of liberty and due process of law, in violation of section 1 of the fourteenth amendment to the Federal constitution.

* * * * * * *

"The ordinance is not unreasonable and is not susceptible to the charges lodged against it of being a violation of the provisions named of the State and Federal constitutions."

Section 237 (a), as amended February 13, 1925, of the Judicial Code of the United States provides (28 U. S. C. A., Sec. 344):

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Supreme Court of the United States has construed the words 'statute of any State", contained in the above subsection, as meaning and including a municipal ordinance enacted pursuant to power granted to such municipality by the law of the state: *John P. King Mfg. Co.* v. *City Council of Augusta* (1928), 277 U. S. 100, 72 L. Ed. 801.

The ordinance involved in the present case was passed by the City Council of the City of Chicago pursuant to Sections 1, 54, 55, 56 and 102 of Article V of "An Act to provide for the incorporation of cities and villages", as amended [Ill. State Bar Stats. (1935) c. 24, "Cities, Villages and Towns," pars. 65 (1), 65 (54), 65 (55), 65 (56) and 65 (102)], which are as follows:

> "65 (1). Powers generally of city councils and presidents and boards of trustees in villages.] §1. The city council in cities, and the president and the board of trustees in villages shall have power to control the

finances and property of the corporation, and shall have in addition thereto the powers enumerated in sections 2 to 102 of this Article, each inclusive.

"65 (54). Inspection—Of merchandise.] §54. To regulate the inspection, weighing and measuring of brick, lumber, firewood, coal, hay, and any article of merchandise.

"65 (55). Inspection—Of weights and measures.] §55. To provide for the inspection and sealing of weights and measures.

"65 (56). Enforce use of same.] §56. To enforce the keeping and use of proper weights and measures by vendors.

"65 102). Ordinances and rules to execute powers —Limitation on punishments.] §102. To pass all ordinances, rules and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: *Provided,* no fine or penalty shall exceed $200.00 and no imprisonment shall exceed six months for one offense."

The final judgment entered herein is therefore a judgment in the highest court of Illinois in which a decision in the suit can be had and there was drawn in question in said suit the validity of a statute of the State of Illinois (to-wit, the ordinance of the City of Chicago respecting the regulation of weights and measures enacted pursuant to statutes of the State of Illinois), on the ground of its being repugnant to the Constitution of the United States and the decision of the Supreme Court of the State of Illinois was in favor of its validity, and therefore, under the Judicial Code of the United States in effect prior to January 31, 1928, the appellant would have been entitled to have said judgment reviewed by the Supreme Court of the United States on writ of error.

On January 31, 1928 the Congress of the United States passed the following act, as amended April 26, 1928, (28 U. S. C. A., Sections 861a and 861b):

> "861a. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.
>
> "861b. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

The present appeal, therefore, is a substitute for the review by writ of error existing as a matter of right prior to January 31, 1928, and is brought on the ground that the judgment of the highest court of Illinois sustained the validity of a statute of Illinois (*i. e.*, an ordinance of the City of Chicago) against the contention made below by the appellant that said statute was invalid because repugnant to the Constitution of the United States.

Since the complete and total destruction of a lawful and legitimate business must necessarily follow the sustaining of the ordinance in question, with far reaching consequences to the general public and to whole communities dependent for their existence upon this industry, a substantial constitutional question is presented both under the equal protection of the laws and the due process clauses of the Fourteenth Amendment to the Federal Constitution.

In similar situations, the Supreme Court of the United States has repeatedly held that no State by statute has the right to prohibit the doing of a lawful business under the exercise of its police power unless such prohibition is

necessary to protect the general welfare of the public. See:

Lockner v. *New York*, 198 U. S. 45, 49 L. Ed. 937;
Truax v. *Raich*, 239 U. S. 33, 60 L. Ed. 131;
Adams v. *Tanner*, 244 U. S. 590, 61 L. Ed. 1336.

The ordinances involved, requiring as they do the obtaining of the weight of the unloaded vehicle before delivery of the commodity contained therein, prohibit the trucking of coal direct from mines located outside the City of Chicago to Chicago consumers even though such coal has been weighed there in accordance with State laws and over State-inspected scales. In brief, the ordinances, the pertinent sections of which are set out above, require that such coal be unloaded before delivery in Chicago and reweighed in order that the tare weight (the weight of the empty vehicle) may be obtained and set forth in a public weighmaster's certificate which is required by the ordinance to be delivered to the consignee *before the coal is delivered to the consignee from the vehicle.* This totally unnecessary rehandling of coal in transit from mine to consumer involves labor costs of $1.00 a ton and the grade of the coal is broken down by such unloading and, unless regraded, cannot be delivered without violating Section 3342 of the Chicago ordinances (unprinted record, p. 112) so that the practical effect of the reweighing requirements of the ordinance is that coal cannot legally be trucked direct from the mine to the consumer even though there are in existence, as is more specifically hereinafter pointed out, means of verifying the mine weights before delivery to the Chicago consumer which do not involve unloading and reloading the coal while in transit.

While the ordinances set forth above provide for the issuance of weighmaster's licenses to various persons operating scales in the City of Chicago, which persons are

designated as "public weighmasters," no means of regarding coal and no place for unloading the coal in transit are furnished by the City of Chicago and to obtain the weight of the empty vehicle each time and to regrade the coal after unloading it requires the establishment of a yard and tipple within the city limits of Chicago.

The ordinance in question was clearly designed to apply to resident dealers selling from their own yards and to permit them, if owning scales within the City of Chicago (as they must in order to operate such a coal business) to become licensed public weighmasters and appoint their own employes as their deputy weighmasters, so that the only burden imposed *by the ordinance* upon the operator of a coal yard in the City of Chicago is that of giving a $2,000 bond as a public weighmaster. This privilege of obtaining a weighmaster's license *is refused the non-resident mine or any dealer not operating a scale in the City of Chicago.*

Coal sold from Chicago coal yards is shipped by rail into the yard as "mine run" coal and is graded for the first time in the yard, at which time it is also for the first and only time weighed. In the case of the resident coal dealer delivering coal from his yard, *the ordinance requires no rehandling of the coal* after it is graded and weighed for sale to the consumer. The record here presented shows that the coal involved in this controversy was both graded and weighed at the mine (unprinted record, p. 51) as required by the State statute set forth above, but the appellant is convicted of violating the ordinance because he did not unload his coal and have it reweighed and regraded after entering the limits of the City of Chicago.

The Supreme Court of Illinois has held that in the instant case the ordinance complained of is to be construed as applying to the appellant's business. While the question of the construction of the State statute is finally deter-

mined by the decision of the Supreme Court of Illinois, yet whether or not the statute as construed is repugnant to the Federal Constitution is a question to be decided by the United States Supreme Court. See:

Price v. *Illinois,* 238 U. S. 446, 59 L. Ed. 1400;

Farmers Irrigation Dist. v. *Nebraska,* 244 U. S. 325, 61 L. Ed. 1168;

Hutchinson Ice Cream Co. v. *Iowa,* 242 U. S. 153, 61 L. Ed. 217;

Atchison, T. & S. F. v. *Vosburg,* 238 U. S. 56, 59 L. Ed. 1199;

In The Municipal Court of Chicago and in the Supreme Court of the State of Illinois, the appellant contended that if the ordinance were construed as applying to his business, it effectively prohibited such business because it required him to go into a totally different business, namely, that of delivering coal from a local coal yard. The decision of the majority of the Supreme Court of Illinois in effect holds that this result is incidental to the enforcement of the ordinance and that the appellant must abandon the lawful and legitimate business of trucking coal direct from mine to consumer. That such interference with a lawful and legitimate business is unconstitutional has been clearly decided by the Supreme Court of the United States in the case of *Louis K. Liggett Co.* v. *Baldrige,* 278 U. S. 105, 113, in the following language:

> "A State cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

As we contended in the court below and as stated in the dissenting opinion, a reasonable ordinance could and would provide for weighing the gross load and permitting the

delivery of the coal before requiring the trucker to weigh the empty truck to verify the tare weight shown on the delivery ticket issued at the mine. Another method of verifying such tare weight would be, as we also suggested in the court below, to stencil the tare weight of the vehicle on the truck. Neither of these methods of obtaining the tare weight is permitted under the present ordinances.

The City of Chicago has itself recognized by other sections of the same ordinance that the only reasonable method of verifying net and tare weights of a vehicle, which has previously been loaded and weighed, is by weighing the loaded vehicle first, permitting delivery of the commodity contained therein and then weighing the empty vehicle: Revised Chicago Code, Sections 2939, 2950, 2951, 3342 and 3445 (unprinted record, pp. 106, 108, 108-109, 112-113, 115).

The Chicago ordinances set forth above provide that a resident of Chicago having a scale within the city limits may weigh over his own scales coal which he sells from his own yard and may appoint his own employee as a deputy to do the weighing (unprinted record, p. 108). Allowing this privilege in one section of the ordinance eliminates, as to those eligible to be public weighmasters at the place where their coal is loaded, the burden of unloading and reloading the coal in transit, which is the burden imposed by Section 2947 as to all dealers who are not eligible to become public weighmasters at the point of original loading. The ordinance, therefore, does not interfere with the business of a coal dealer selling coal from a local yard. Manifestly the ordinance was intended to regulate that sort of business and was designed not to be unnecessarily harsh as to that method of doing business. However, *when applied to a totally different business,* namely, the business of selling coal trucked direct from the mine to the consumer, it imposes an unconscionable burden. If the mine owner were permitted by the ordinance to obtain a license as a public

weighmaster at the point of original loading in the same manner as a local coal dealer is privileged so to do, there could be no valid complaint against the operation of this ordinance. The vice of the situation is that the non-resident mine owner cannot have a weighing by a public weighmaster as compelled by the ordinance without re-handling the coal within the municipal limits of the City of Chicago. A case is thus presented in which a business totally different from that of selling coal from a yard in Chicago is subjected to the same burden of complying with the ordinance but is denied the same privilege of obtaining a weighmaster's license at the point at which the coal is weighed, graded and loaded in the truck for shipment to the consumer. An *equal burden* is thus added to an *unequal privilege*, resulting in gross inequality of treatment of two businesses which the Court below found are to be subjected to the same burden (of obtaining public weighmaster's weight certificates) and such gross inequality denies to the appellant the equal protection of the laws guaranteed to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States and deprives him of liberty and property without due process of law, in violation of the same amendment.

The unreasonable and unequal burden imposed upon the appellant and those similarly situated, under the claim that it is an exercise of the police power, denies to this appellant the right to do a lawful and legitimate business with no corresponding benefit to the public; as stated by the dissenting justices, 363 Ill. 125, at page 136, 1 N. E. (2d) 396, at page 401:

> "It is quite as much in the interest of the public welfare that the people of the city of Chicago be afforded access to cheap markets for the necessities of life as it is that weights be watched. To so restrict access to

such market by putting such unnecessary expense on the purchaser is clearly unreasonable.

"It is likewise an unjust discrimination against large communities that happen to be so situated as to enable them to take coal from the ground cheaply and thus give a livelihood to thousands working in that business.

"It is well known that there are many sources of cheap coal within trucking distance of Chicago, and that by loading directly onto a truck at the mine and unloading directly into the consumer's bin, many handling charges are avoided. While such competition is clearly disadvantageous to Chicago coal dealers, it is certainly advantageous to the mine owners and those citizens of Chicago who wish to purchase this kind of coal. No one can doubt the legal right of these mine owners and consumers to deal directly with each other if they choose so to do, and, in our opinion, an ordinance which throws an artificial and unreasonable barrier across the path of this commerce, without any corresponding benefit to the health, morals, safety or welfare of the people, is void."

For all of the foregoing reasons, a substantial constitutional question is presented for decision in this case and an appeal lies as a matter of right from the judgment of the Supreme Court of the State of Illinois to the Supreme Court of the United States.

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May 25, 1936.